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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THERESA TORRICELLAS,

Plaintiff and Appellant,

v.

PHYLLIS BURKHARDT, et al.

Defendants and Respondents.

E069330

(Super.Ct.No. RIC1509979)

OPINION

APPEAL from the Superior Court of Riverside County. John W. Vineyard, Judge.  
Reversed.

Theresa Torricellas, in pro. per.; and Wilson, Elser, Moskowitz, Edelman &  
Dicker and Robert Cooper, for Plaintiff and Appellant.

Xavier Becerra, Attorney General, Monica N. Anderson, Senior Assistant  
Attorney General, Misha D. Igra, Virginia I. Papan and Kevin A. Voth Deputy Attorneys  
General, for Defendants and Respondents.

## I.

### INTRODUCTION

Plaintiff and appellant, Theresa Torricellas, appeals from a judgment of dismissal entered after the trial court sustained, with leave to amend, a demurrer by defendants and respondents, Phyllis Burkhardt and P. Dixon-Stamps (defendants), to plaintiff's first amended complaint (FAC). The court entered a judgment of dismissal after plaintiff failed to file a second amended complaint, failed to respond to the court's order to show cause (OSC) regarding dismissal for failure to amend and declined the court's offer of additional time to amend.<sup>1</sup>

Plaintiff contends the trial court abused its discretion by dismissing the FAC after sustaining defendants' demurrer to the FAC, without providing notice of the basis for dismissal of the FAC. Plaintiff further contends she was deprived of meaningful access to the court in violation of her constitutional rights to due process and equal protection. Plaintiff argues she was denied the opportunity to oppose the demurrer, and the court abused its discretion in denying a continuance of the hearing on defendants' demurrer.

In our prior nonpublished opinion (*Torricellas v. Burkhardt, et al.* (July 22, 2020, E069330) [nonpub. opn.]), we affirmed the trial court's judgment entered after dismissing the FAC for failure to amend. The Supreme Court granted plaintiff's petition for review and transferred the case back to this court for the limited purpose of reconsideration in

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<sup>1</sup> A third defendant, California Department of Corrections and Rehabilitation (CDCR), is not a party to this appeal.

light of *Yarbrough v. Superior Court* (1985) 39 Cal.3d 197 (*Yarbrough*) and plaintiff's trial court case management statement requesting appointment of counsel and objecting to inadequate notice of the trial court's dismissal of the FAC.

Following remand from the Supreme Court, both plaintiff and defendants filed supplemental briefs in this matter. Plaintiff contends in her supplemental brief that the matter must be remanded to the trial court with directions to appoint counsel, funded from county funds or from CDCR's operating budget. Defendants maintain the dismissal judgment should be affirmed and there is no need for remand because plaintiff was not denied access to the courts and she has not affirmatively shown the trial court committed a miscarriage of justice by denying her request for appointment of counsel.

The order dismissing defendants from plaintiff's case is reversed and the case is remanded with directions the trial court determine under *Yarbrough* (1) whether plaintiff has been deprived of her due process right to court access and (2) whether to grant plaintiff's request for court-appointed counsel or order other alternative measures to protect her access to the court while prosecuting her claims against defendants in this case.

## II.

### FACTS AND PROCEDURAL BACKGROUND<sup>2</sup>

At all times relevant to this case, plaintiff has been an inmate incarcerated at the California Institute for Women, within the custody of CDCR. Burkhardt is a teacher and college coordinator employed by CDCR. Dixon-Stamps is a correctional counselor II and appeals coordinator, also employed by CDCR.

Plaintiff's lawsuit concerns defendants issuing plaintiff three chronos and documenting plaintiff's behavior leading to the chronos. A chrono is a report documenting misconduct by an inmate. (Cal. Code Regs., tit. 15, § 3312, subd. (a).) In May 2014, Burkhardt issued plaintiff's first chrono, which was a custodial counseling chrono documenting that, while plaintiff was performing her job assignment as a tutor, she was rude, offensive, and disrespectful when interacting with another inmate. Burkhardt indicated in the chrono that she wanted plaintiff removed from her position as a tutor.

Two months later, Burkhardt issued a second chrono requesting plaintiff be removed from her position as a tutor because plaintiff had consistently exhibited aggressive and callous behavior toward staff and other inmates seeking assistance.

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<sup>2</sup> The record on appeal does not include a reporter's transcript.

In September 2014, Dixon-Stamps issued a third chrono documenting her interview with plaintiff regarding properly filing prison grievances. Plaintiff repeatedly failed to follow instructions on filing CDCR inmate appeals, and during the interview, plaintiff was unreceptive to counseling and became verbally combative.

*A. First Hearing on Demurrer to FAC*

In August 2015, plaintiff filed a lawsuit against defendants and CDCR based on the three disciplinary chronos issued against her. Plaintiff's FAC included 11 causes of action, including causes of actions against defendants for defamation, false light, intentional infliction of emotional distress, and violations of the Information Practices Act of 1977 (Civ. Code, § 1798 et seq.) (IPA). Plaintiff alleged defendants issued the three chronos knowing they contained false information and would be placed in her prison file. Plaintiff maintained that the chronos were, or could be, used against her during her parole determination hearings. They could also be used to remove her from her prison position in the education department and to restrict her use of the prison grievance process. Plaintiff requested monetary damages and injunctive relief.

Defendants demurred to plaintiff's FAC. Plaintiff did not file opposition. Although the court gave plaintiff leave to appear by CourtCall at the hearing on defendants' demurrer, plaintiff did not appear or call. In April 2016, the court sustained defendants' demurrer with 30 days leave to amend.

Plaintiff filed a writ petition seeking to disqualify two superior court judges assigned to her case. (*Torricellas v. Riverside County Superior Court* (June 10, 2016, E065723 [nonpub. opn.].) This court found the two trial court judges were disqualified “by operation of law,” and issued a peremptory writ of mandate directing the trial court to vacate its order striking plaintiff’s statement of disqualification and dissolve the stay of the proceedings.

Meanwhile, plaintiff moved for relief from the order sustaining defendants’ demurrer to the FAC, requested a new hearing, and filed six requests for fee waivers.

In September 2016, after this court issued its peremptory writ of mandate order, the case was reassigned to a new judge and the trial court vacated its ruling on defendants’ demurrer to the FAC. The court also permitted plaintiff to file opposition.

#### *B. Second Hearing on Demurrer to FAC*

On November 16, 2016, defendant’s demurrer to the FAC was reheard by a different judge. Plaintiff did not appear by telephone or otherwise. The court adopted its tentative ruling and sustained defendants’ demurrer, with 90 days leave to amend. Defendants served plaintiff with notice of the court’s ruling on the demurrer.

On November 16, 2016, the day of the demurrer hearing, the court received by mail plaintiff’s opposition to the demurrer. The proof of service of the demurrer on defendants is dated November 10, 2016. Plaintiff argued in her opposition that her access to the court was being obstructed by court clerks and judicial staff, who denied her fee waivers, which were necessary to filing her motions, continuance requests, and other

documents. The court clerks and staff rejected her documents because of her inability to pay the filing fees. Plaintiff also argued her access to the court was obstructed by the lack of adequate law library access and because of numerous prison lockdowns, “modified programs,” and other scheduling that interfered with her ability to conduct research and prepare timely filed legal documents. Plaintiff requested counsel appointed to represent her because of “the repeated injustice being perpetuated against her.” She therefore requested the demurrer hearing be taken off calendar or continued until counsel was appointed for her and the erroneous partial denial of her fee waiver request was resolved.

On February 14, 2017, the 90-day period to amend the FAC expired. Because plaintiff failed to file a second amended complaint, the court issued an OSC why defendants should not be dismissed from the action.

On April 6, 2017, plaintiff filed a case management statement stating that she intended to file a motion for counsel and request to vacate all prior orders because of misconduct and fraud committed by the court and CDCR, resulting in denial of her right to court access. Plaintiff therefore requested appointment of counsel to correct the enumerated problems and prevent further obstruction of her access to the court. Plaintiff did not appear at the April 2017 case management conference because of an unsuccessful attempt to appear telephonically. The matter was continued to June 2017.

Plaintiff filed a notice of intent to appear by telephone at the OSC hearing on June 28, 2017, and another case management statement complaining of a lack of court access and requesting court-appointed counsel. On June 26, 2017, the court continued the case management conference and OSC hearing to August 23, 2017. On the court's own motion, the court ordered plaintiff to appear by telephone no later than 8:20 a.m. and provided a telephone number to call. Notice was sent to plaintiff. In August, plaintiff filed another case management statement complaining of a lack of court access and requesting court-appointed counsel.

### *C. OSC Hearing*

On August 23, 2017, plaintiff appeared by telephone for the case management conference and OSC hearing. During the OSC hearing, the court denied plaintiff's request for appointment of counsel, stating that the court did not have the resources to grant the request. The court also denied plaintiff's request to vacate the court's ruling on defendants' demurrer. The court ordered the FAC dismissed with prejudice as to defendants Burkhardt and Dixon-Stamps.

Defendants filed a notice of judgment of dismissal of defendants. The notice states that the court denied plaintiff's request to vacate the court's ruling on defendants' demurrer "because the [c]ourt ruled on the merits and the opposition would not have changed the ruling since plaintiff did not state a claim against defendants." The court, however, offered plaintiff leave to file a second amended complaint to cure the defects, but plaintiff informed the court that she declined to do so. The court therefore dismissed



defendants from the lawsuit with prejudice. The case remained pending against CDCR. The court reminded plaintiff that she was responsible for arranging the CourtCall appearance with the prison staff. The court also noted that defendants' counsel had notified the litigation coordinator at the prison that plaintiff may appear by telephone at the proceedings in the case.

On October 6, 2017, plaintiff filed a notice of appeal of the judgment of dismissal. Plaintiff also appealed the order denying her request to vacate and orders denying requests for counsel and refusing to grant a fee waiver.<sup>3</sup> On January 10, 2018, the court entered an order dismissing with prejudice defendants from plaintiff's lawsuit.

### III.

#### COMPLAINT DEFECTS REQUIRING AMENDING THE FAC

Plaintiff contends there were insufficient grounds for sustaining defendants' demurrer to the FAC. We disagree. First, defendants, as public employees, were statutorily immune from liability for monetary damages (causes of action 1-3, 5-7, 9-10). Government Code section 820.2 provides immunity to public employees from liability for "an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." Government Code section 821.6 also provides public employee immunity from liability for injury caused by the public employee "instituting or prosecuting any judicial or

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<sup>3</sup> We note, plaintiff in her appellant's reply brief is not requesting the trial court vacate its order sustaining defendants' demurrer to causes of action 4 and 8, which are founded on the IPA.

administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause.”

Under Government Code section 821.6, “[a] public employee acting within the scope of employment is immune from liability for an injury caused by the employee’s ‘instituting or prosecuting any judicial or *administrative proceeding* . . . even if he acts maliciously and without probable cause.’ (Gov. Code, § 821.6.) California courts construe [Government Code] section 821.6 broadly in furtherance of its purpose to protect public employees in the performance of their prosecutorial duties from the threat of harassment through civil suits. [Citations.]” (*Gillan v. City of San Marino* (2007) 147 Cal.App.4th 1033, 1047-1048, italics added.)

“Government Code section 821.6 immunizes not only the act of filing or prosecuting a judicial or administrative complaint, but also extends to actions taken in preparation for such formal proceedings. [Citation.] . . . The immunity applies even if the officers abused their authority. [Citation.]” (*Gillan v. City of San Marino, supra*, 147 Cal.App.4th at p. 1048.) Immunity under Government Code section 821.6 extends to “causes of action arising from conduct protected under the statute, including defamation and intentional infliction of emotional distress.” (*Gillan v. City of San Marino, supra*, at p. 1048; see also *Javor v. Taggart* (2002) 98 Cal.App.4th 795, 808-809.)

Plaintiff’s FAC is founded on allegations that defendants, who were carrying out their job responsibilities as CDCR public employees, committed wrongful acts, including issuing chronos containing false statements regarding plaintiff’s conduct, knowing the

false information would be placed in plaintiff's prison file and could be used against her during parole determination hearings. Plaintiff also alleged the false information could be used to remove her from her prison job and lead to restricting her use of the prison grievance process. Based on these FAC allegations, defendants are immune from liability for monetary damages under Government Code sections 820.2 and 821.6, because defendants' alleged wrongful acts were committed in their capacity as public employees, incident to their duties and for the benefit of their employer, CDCR. Furthermore, such acts were in furtherance of inmate discipline and investigation impacting official administrative proceedings, including plaintiff's parole hearings and potential disciplinary and prison grievance proceedings. (*Amylou R. v. County of Riverside* (1994) 28 Cal.App.4th 1205, 1209-1210.)

Defendants likewise are immune from damages under Civil Code section 47 from liability based on their statements made while carrying out their CDCR job responsibilities. Under Civil Code section 47, a privileged statement is one made "(a) In the proper discharge of an official duty. [¶] (b) In any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law . . . ." (*Ibid.*) The FAC alleges defendants acted wrongfully while discharging their official duties as CDCR public employees, and such acts impacted, or would impact, the official proceedings of the parole board evaluating plaintiff's suitability for parole.

In addition to being immune from liability for monetary damages, defendants are not proper defendants of plaintiff's IPA claims seeking injunctive relief under Civil Code sections 1798.45 and 1798.47, because such IPA claims can only be brought against agencies. (Civ. Code, §§ 1798.45 ["An individual may bring a civil action *against an agency* whenever such agency does any of the following . . . ." (italics added)], 1798.47 ["*Any agency* that fails to comply with any provision of this chapter may be enjoined by any court of competent jurisdiction" (italics added)].)

Because of the defects in the FAC, the trial court properly sustained defendants' demurrer to the FAC with leave to amend.

#### IV.

#### APPOINTMENT OF COUNSEL<sup>4</sup>

Because plaintiff failed to amend the FAC, the trial court dismissed her action against defendants. Plaintiff appealed the judgment of dismissal and this court affirmed it. Plaintiff filed a petition for review, which the Supreme Court granted. The Supreme Court has instructed this court to reconsider our decision affirming the judgment of dismissal "in light of *Yarbrough*[, *supra*,] 39 Cal.3d 197 and pages 578 to 582 of the clerk's transcript in which [plaintiff] requested the appointment of counsel and objected that she had not been notified of the basis for the dismissal of her First Amended

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<sup>4</sup> Defendants' motion for judicial notice, filed on May 8, 2020, requesting judicial notice of trial court records in this case involving CDCR, is denied on the ground the court documents concern proceedings occurring in 2019, after dismissal of defendants in August 2017. (Evid. Code, § 452, subd. (d), § 459, Cal. Rules of Court, rule 8.155(a)(1)(A).)

Complaint.” *Yarbrough* concerns an inmate’s due process right to access to the courts in civil court proceedings. Pages 578 to 582 of the clerk’s transcript consist of a copy of plaintiff’s case management statement filed in April 2017, in which plaintiff complained of a lack of court access and requested court-appointed counsel.

*A. Procedural Background Relating to Court-Appointed Counsel Request*

In our previous opinion, we noted that plaintiff argued on appeal that the CDCR and trial court impeded her ability to file opposition to defendants’ demurrer to the FAC, and appear at the hearing on November 16, 2016. We concluded that, regardless of whether there was any validity to this objection, the record demonstrated that the court gave plaintiff ample opportunity to amend the FAC on several occasions, including during the OSC hearing on August 23, 2017.

During the OSC hearing on August 23, 2017, plaintiff appeared by telephone and had the opportunity to argue why the court should vacate the November 16, 2016 order sustaining defendants’ demurrer. The trial court indicated it had considered plaintiff’s late demurrer opposition filed on November 16, 2016, and concluded the court had properly sustained defendants’ demurrer because plaintiff had not alleged valid claims against defendants, and it did not appear plaintiff was able to do so by amending. Nevertheless, the court offered plaintiff additional time to amend the FAC. Plaintiff rejected the court’s offer, resulting in dismissal of her FAC against defendants.

Plaintiff was given repeated opportunities to amend the FAC to correct the defects stated in defendants' demurrer to the FAC, yet plaintiff did not amend the FAC. Plaintiff also did not demonstrate she could cure the defects in the FAC. This court concluded in its previous opinion that, under these circumstances, the trial court did not abuse its discretion in dismissing the FAC for failure to amend under Code of Civil Procedure section 581, subdivision (f)(2). We acknowledged in our previous opinion that plaintiff argued that plaintiff was denied access to the court by the court and CDCR staff impeding her from litigating her case while incarcerated.

Rather than discussing *Yarbrough* and other case law relevant to the issue of inmate court access in civil proceedings, we made the factual determination, which should have been left to the trial court on remand, that there was no showing that plaintiff had been deprived of court access. In accordance with the Supreme Court's instructions to reconsider this matter in light of *Yarbrough* and plaintiff's April 2017 case management statement, we further address plaintiff's request for court-appointed counsel and her due process right to court access.

*B. Plaintiff's April 2017 Case Management Statement*

Plaintiff stated in her April 2017 case management statement that she intended to file a motion for counsel and to vacate all prior orders due to fraud by the court and denial of court access. Plaintiff asserted that she had paid the \$450 trial court filing fee but afterwards the court refused to file her motions and documents, with the exception of her case management statement. In addition, plaintiff asserted she was not provided with

notice of dismissal of defendants from her case or the reasons for the court doing so. Plaintiff stated that she was unable to make a court-authorized telephonic appearance at the demurrer hearing and was unable to move for an extension to file responsive documents to the demurrer or any other hearing because of the court's policy of rejecting her papers because of nonpayment of filing fees. Plaintiff further claimed the court refused to file everything else she attempted to file because of nonpayment of filing fees, thereby depriving her of her right to court access. Plaintiff concluded that the trial court committed fraud against her by refusing to allow her to file anything after she paid the initial \$450 filing fee and therefore all orders entered after she paid the fee should be vacated and the court should appoint an attorney for her to ensure she is able to prosecute her case.

In addition, plaintiff stated in her case management statement that, because the court perpetrated a fraud on her by vacating the defendants' defaults based on favoritism, the order should be vacated, and every order thereafter, with the defaults re-entered against defendants and plaintiff's original complaint restored. Plaintiff asserted the court also repeatedly improperly denied her fee waiver requests in 2016. Plaintiff concluded, "There is no point in plaintiff knocking herself out in a case where the court is routinely and regularly cheating and defrauding her of her legal rights and ability to litigate the case and has provided special advantage to defendants every step of the way." Therefore plaintiff requested appointment of counsel to correct the deficiencies and prevent further obstruction of her access to the court.

Plaintiff did not appear at the April 2017 case management conference because of difficulty appearing telephonically, and the matter was continued to June 2017, and then to August 23, 2017. Plaintiff filed additional case management statements in June and August, repeating her court-access complaint and request for court-appointed counsel.

*C. Law Applicable to Right to Court Access and Court-Appointed Counsel*

“One of the goals of our legal system is to secure access to our courts for everyone.” (*Hoversten v. Superior Court* (1999) 74 Cal.App.4th 636, 641.) It is well established that an indigent inmate, typically a civil defendant but also as a civil plaintiff, has a right to a meaningful opportunity to be heard in court. (*Payne v. Superior Court* (1976) 17 Cal.3d 908, 926-927 (*Payne*); *Yarbrough, supra*, 39 Cal.3d at pp. 203-207; *Smith v. Ogbuehi* (2019) 38 Cal.App.5th 453, 458-459 (*Smith*).) This constitutional right may, but is not required to be, satisfied by court appointment of counsel or can be satisfied by other court access measures. (*Payne, supra*, at pp. 926-927; *Yarbrough, supra*, at pp. 203-207.) An indigent prisoner may face obstacles that prevent appearing in civil court proceedings. (*Hoversten v. Superior Court, supra*, at p. 642.) Even though prisoners do not ordinarily have the right to appear personally in court on civil matters, “courts are encouraged to devise alternative means to secure prisoners ‘meaningful’ access to the courts.” (*Ibid.*)



The California Supreme Court in *Payne, supra*, 17 Cal.3d 908 and *Yarbrough, supra*, 39 Cal.3d 197, have provided guidelines for determining whether an inmate is entitled to court-ordered counsel in a civil action. In *Payne*, the plaintiff, Torrey Payne, was convicted of receiving stolen property. The owner of the stolen property filed a civil lawsuit against Payne for damages. During the civil action, Payne was incarcerated and his requests for an attorney in the civil action and to attend the trial were denied. As a result, a default judgment was entered against him. The trial court also denied Payne's motion to vacate the default judgment, and the court of appeal denied Payne's petition for writ of mandate. Payne argued that he was unconstitutionally deprived of his right to access the courts and therefore the civil court judgment should be set aside and the trial court should appoint counsel for him. (*Payne, supra*, 17 Cal.3d at p. 912.)

The court in *Payne* concluded that Payne's "stake in the proceedings was undisputed, and if the court ascertained that [he] was indigent it had no other course but to vacate the judgment and appoint counsel." (*Payne, supra*, 17 Cal.3d at p. 926.) The court further emphasized that it was not holding that "*all indigents* have a right to counsel in civil cases." (*Id.* at p. 927, italics added.) Nor was it holding that "indigent prisoners who are *plaintiffs* in civil actions may secure appointed counsel or the right to appear personally." (*Id.* at pp. 926-927, italics added.) The *Payne* court noted that neither of these two issues was before it.

The *Payne* court explained that, “All we decide is that when a prisoner is threatened with a judicially sanctioned deprivation of his property, due process and equal protection require a meaningful opportunity to be heard. How that is to be achieved is to be determined by the exercise of discretion by the trial court.” (*Payne, supra*, 17 Cal.3d at p. 927.) The court in *Payne* therefore issued a peremptory writ of mandate directing the trial court to vacate the trial court civil default judgment entered against the petitioner and further directing that, if the trial court found that the petitioner was incarcerated and indigent, to conduct further proceedings consistent with the *Payne* opinion. (*Ibid.*)

In *Yarbrough, supra*, 39 Cal.3d 197, Terry Yarbrough was convicted of second degree murder and was serving a 17-year sentence when sued for wrongful death by the murdered victim’s son. A \$2,000,000 default judgment was entered against Yarbrough. He moved for appointment of counsel, alleging he was incarcerated, indigent with no assets, uneducated, and unable to respond to the lawsuit or retain an attorney. The trial court agreed that Yarbrough needed an attorney but concluded the court did not have authority to order the county to pay for court-ordered counsel. Therefore the court did not appoint counsel for Yarbrough. Yarbrough filed a petition for writ of mandate to compel the trial court to appoint counsel and provide reasonable compensation of counsel.

The California Supreme Court in *Yarbrough, supra*, 39 Cal.3d 197, recognized that, in *Payne, supra*, 17 Cal.3d 908, the court held “that as a matter of due process and equal protection under both the federal and California Constitutions an indigent prisoner who is a defendant in ‘a bona fide legal action threatening his interests’ is entitled to access to the courts to be heard in his defense. We left to the trial court’s discretion how access is to be achieved in particular cases, recognizing that, at times, appointment of counsel may be the only alternative. We made it clear, however, that *the trial court’s authority to appoint counsel is independent of its power to order compensation.*” (*Yarbrough, supra*, at p. 200, italics added.)

Citing *Payne, supra*, 17 Cal.3d 908, the court in *Yarbrough* noted that, “In an appropriate case, and as a last alternative, appointment of counsel may be the only way to provide an incarcerated, indigent civil defendant with access to the courts for the protection of threatened personal and property rights. *We again stress that access—not the right to counsel—is the keystone* of the structure we built in *Payne*, and we point out once more that *the power to appoint is independent of the power to compensate.*” (*Yarbrough, supra*, 39 Cal.3d at pp. 200-201, italics added.)

The court in *Yarbrough* added that “[i]t falls on the trial court to recognize and adhere to the guidelines set out in *Payne*.” (*Yarbrough, supra*, 39 Cal.3d at p. 201.) The *Yarbrough* court noted that the trial court proceedings in *Yarbrough* were extremely cursory regarding application of the *Payne* guidelines. The *Yarbrough* court stated that, “[a]t a minimum, . . . the court is required to conduct the inquiry we outlined

in *Payne* and clarified here: to consider the defendant's indigency, the feasibility of a continuance, whether defendant's interests are actually at stake, and whether counsel would be helpful under the circumstances of the case." (*Yarbrough, supra*, at p. 207.)

The *Yarbrough* court concluded that the trial court had not seriously considered any factor other than indigency and that several other findings were unsupported by the evidence. The court in *Yarbrough*, therefore, held that "the matter must be returned to the trial court for further proceedings in which the court, exercising its discretion in accord with the guidelines outlined above, reconsiders the question of how to effectuate Yarbrough's right of access to the courts." (*Yarbrough, supra*, 39 Cal.3d at p. 207.)

The *Yarbrough* court acknowledged that it did not address the issues regarding "the power of the trial court to appoint an unwilling attorney to represent an incarcerated civil defendant, as well as its power and duty to provide funds for counsel's services and costs and, of course, the source of such funds. The fact that we find that it would be premature to discuss these issues in this particular case should not be interpreted to mean that we find that courts are powerless in those regards. The problem is, however, primarily a legislative one." (*Yarbrough, supra*, 39 Cal.3d at p. 207.) The court in *Yarbrough* thus ordered issuance of a peremptory writ of mandate issue, directing trial court to conduct further proceedings in a manner consistent with the opinion in *Yarbrough*. (*Ibid.*)

In the more recently decided case of *Smith, supra*, 38 Cal.App.5th at pages 458-459, 465, the court held that an inmate's due process right to court access in a civil action applied, not only to inmates who are defendants, but also to inmates who are plaintiffs. (*Ibid.*) In *Smith*, the court explained that "[a]ccess to the courts is 'a right guaranteed to all persons by the federal and state Constitutions.' [Citation.] [] The constitutional right of access to the court extends to prisoners. [Citation.] In addition to these constitutional foundations, California state prisoners have the statutory right '[t]o initiate civil actions' as plaintiffs. (Pen. Code, § 2601, subd. (d).) This statute has been interpreted 'to include within its scope the right to be afforded meaningful access to the courts to *prosecute* those civil actions.' [Citation.] Under this statute, 'a prisoner may not be deprived, by his or her inmate status, of meaningful access to the civil courts if the prisoner is both indigent and a party to a bona fide civil action threatening his or her personal or property interests.' [Citation.]" (*Id.* at p. 465.)

In *Smith, supra*, 38 Cal.App.5th 453, Gregory Smith, who was an indigent inmate, filed a medical malpractice lawsuit against a prison doctor and nurse. Smith filed a motion for court-appointed counsel, arguing that as an indigent inmate, he needed an attorney because his claims were factually and legally complex, he had limited ability to investigate facts, obtain discovery, and retain expert witnesses, and his claims, on their face, had merit. The trial court denied the motion, concluding the court did not have authority to appoint an attorney for a plaintiff in a civil case. The court in *Smith* disagreed, stating that "[o]ne of the discretionary measures available to protect the right

of access to the courts is the appointment of counsel. Consequently, the trial court had the discretionary authority to appoint counsel. The court's statement that it was without the authority to appoint counsel did not recognize the existence and scope of its discretionary authority." (*Id.* at p. 458.) As a consequence, the court in *Smith* conditionally vacated its order granting summary judgment and remanded the matter to the trial court, with directions to vacate its order denying Smith's motion for appointment of counsel and conduct a new hearing on Smith's right of access to the courts and request for appointment of counsel. (*Id.* at p. 478.)

The court in *Smith* explained that the exercise of a trial court's discretion is guided by the following three-step inquiry: "First, the trial court determines whether the prisoner is indigent. Second, the court determines whether the lawsuit involves a bona fide threat to the inmate's personal or property interests. If both conditions are satisfied, the trial court must consider the measures available to protect appellant's right of meaningful access to the courts, including the appointment of counsel. Where the indigent prisoner's civil action is bona fide and his or her access to the court is being impeded, a trial court must provide a remedy; it may not choose to do nothing." (*Smith, supra*, 38 Cal.App.5th at p. 458.)

The *Smith* court further provided a nonexclusive list of measures available to trial courts to ensure indigent prisoner litigants are afforded meaningful access to the courts. "Those measures included (1) deferral of the action until the prisoner is released; (2) *appointment of counsel for the prisoner*; (3) transfer of the prisoner to court to attend

hearings or the trial; (4) utilization of depositions in lieu of personal appearances; (5) holding of trial in prison; (6) conducting status and settlement conferences, hearings on motions and other pretrial proceedings by telephone; (7) propounding of written discovery; and (8) use of closed circuit television or other modern electronic media. [Citations.] This list also allows for the “implementation of other innovative, imaginative procedures.” [Citation.]” (*Smith, supra*, 38 Cal.App.5th at p. 467.) The *Smith* court noted that, “[i]n deciding the appropriate measure or measures to assure access, the relevant circumstances include, without limitation, the practicality and effectiveness of the various measures available to protect the right of access to the courts.” (*Ibid.*)

In *Smith*, the court added that the trial court should consider the factors listed in the federal decisions for determining whether exceptional circumstances exist that might warrant appointing counsel in a particular case. (*Smith, supra*, 38 Cal.App.5th at p. 470.) Those factors include “(1) the type and complexity of the case; [¶] (2) whether the indigent is capable of adequately presenting his case; [¶] (3) whether the indigent is in a position to investigate adequately the case; ... [¶] (4) whether the evidence will consist in large part of conflicting testimony so as to require skill in the presentation of evidence and in cross examination’ and (5) ‘whether appointed counsel would aid in the efficient and equitable disposition of the case.’ [Citation.]” (*Smith, supra*, at p. 469.)

#### D. *Analysis*

The trial court did not address plaintiff's complaint of lack of court access or her request for court-appointed counsel until the August 2017, OSC dismissal hearing. There is no indication from the record on appeal that during the OSC dismissal hearing, the trial court addressed the obstacles and court access problems raised in plaintiff's April, June, and August 2017, case management statements. The record merely states that the trial court offered plaintiff an additional opportunity to amend the FAC, plaintiff rejected the offer, and the court then denied plaintiff's request for appointment of counsel on the ground the court did not have the resources to appoint counsel. It is unclear from the record whether the trial court's denial of plaintiff's request for court-appointed counsel was based on an informed exercise of its discretion.

The trial court's denial of court-appointed counsel based on unavailable funding resources suggests the court concluded it was without authority to appoint counsel because of a lack of funding, but, as the court in *Yarbrough* noted, such a determination was premature (*Yarbrough, supra*, 39 Cal.3d at page 207), and "the trial court's authority to appoint counsel is independent of its power to order compensation" (*Yarbrough, supra*, at p. 200). The trial court's order denying appointment of counsel based on a lack of funding indicates the court did not recognize it nevertheless had the discretionary authority to appoint counsel, particularly if it was the only effective measure. "[A] court that is unaware of its discretionary authority cannot exercise its informed discretion." (*Smith, supra*, 38 Cal.App.5th at p. 474.)



Even if the trial court reasonably concluded court-appointed counsel was not required to protect plaintiff's access to the courts because of a lack of resources, a trial court does not have discretion to choose no remedy if an inmate's right to court access is being violated. (*Apollo v. Gyaami* (2008) 167 Cal.App.4th 1468, 1484; *Smith, supra*, 38 Cal.App.5th at p. 458.) As the *Smith* court noted, if both indigency and an inmate's personal or property interests are at stake, as in the instant case, "the trial court must consider the measures available to protect appellant's right of meaningful access to the courts, including the appointment of counsel. Where the indigent prisoner's civil action is bona fide and his or her access to the court is being impeded, a trial court must provide a remedy; it may not choose to do nothing." (*Smith, supra*, 38 Cal.App.5th at p. 458.)

In addition, here, as in *Yarbrough*, the trial court proceedings appear to have been cursory in addressing plaintiff's request for court-appointed counsel. The *Yarbrough* court noted that "we seek to impress on the trial courts the need to exercise their discretion in as informed a manner as possible. At a minimum, then, the court is required to conduct the inquiry we outlined in *Payne* and clarified here: to consider the defendant's indigency, the feasibility of a continuance, whether defendant's interests are actually at stake, and whether counsel would be helpful under the circumstances of the case." (*Yarbrough, supra*, 39 Cal.3d at p. 207.) There is no showing in this case that the trial court considered each of these factors, particularly whether counsel would be helpful in this case.

If, as plaintiff claimed, court and CDCR staff were interfering with her ability to litigate her case and the court failed to provide notice of the grounds for sustaining the FAC demurrer, it is questionable whether allowing plaintiff an additional opportunity to amend the FAC would have resolved plaintiff's alleged court access dilemma without an attorney. The trial court was thus required to address plaintiff's court access complaint and attorney request by making the requisite inquiries outlined in *Payne*.

We conclude the circumstances of this case “are not so overwhelming that the only proper exercise of discretion is the appointment of counsel.” (*Smith, supra*, 38 Cal.App.5th at p. 477.) The determination of whether CDCR or court staff interfered with plaintiff's access to court and whether measures, including appointment of counsel, are required is a factual matter which should be determined by the trial court, rather than this court, under the totality of the circumstances. The choice among the various measures available to protect her right of access to the courts is best left to the trial court, which is responsible for overseeing the litigation and better situated to evaluate how one or a combination of measures would operate “to ensure indigent prisoner litigants are afforded meaningful access to the courts.” (*Apollo v. Gyaami, supra*, 167 Cal.App.4th at p. 1483, citing *Wantuch v. Davis* (1995) 32 Cal.App.4th 786, 792-793.)

Consequently, we reverse the judgment of dismissal and remand the matter to the trial court with directions the trial court conduct further proceedings to determine whether plaintiff was deprived of her right to access to the courts. If so, the trial court shall determine under *Yarbrough* what measures should be ordered to protect plaintiff's right

to meaningful access to the court. Such remedies to be considered should include, but are not limited to, appointment of counsel; allowing plaintiff leave to amend the FAC within a reasonable period of time; providing plaintiff with a statement of reasons for the court sustaining defendants' demurrer to the FAC (Code of Civ. Proc., § 472d<sup>5</sup>); and, if plaintiff is not provided court-appointed counsel, providing other court ordered protections to ensure that plaintiff is provided at the prison with reasonable resources to prosecute her lawsuit in propria persona.

We reject plaintiff's request that this court remand this case with directions to order funding of court-appointed counsel. Addressing funding at this stage is premature and is a factual issue for the trier of fact, not this court to decide. (*Yarbrough, supra*, 39 Cal.3d at p. 207.) This matter must first be remanded to the trial court to determine the factual issues of whether plaintiff has been denied court access, whether measures should be taken to protect her right to court access in the future, and what measures should be ordered.

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<sup>5</sup> Code of Civil Procedure, section 472d provides: "Whenever a demurrer in any action or proceeding is sustained, the court shall include in its decision or order a statement of the specific ground or grounds upon which the decision or order is based which may be by reference to appropriate pages and paragraphs of the demurrer. [¶] The party against whom a demurrer has been sustained may waive these requirements."

V.

DISPOSITION

The order dismissing defendants from plaintiff's case is reversed and the case is remanded with directions the trial court determine under *Yarbrough* (1) whether plaintiff was deprived of her due process right to court access and (2) whether to grant plaintiff's request for court-appointed counsel or order other alternative measures to protect her access to the court while prosecuting her claims against defendants in this case. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON  
J.

We concur:

RAMIREZ  
P. J.

McKINSTER  
J.